S.J.P.R., Inc. d/b/a Sands Hotel and Casino, San Juan *and* Union of Trabajadores de la Industria Gastronomica de Puerto Rico, Local 610, Hotel Employees and Restaurant Employees International Union, AFL–CIO. Case 24–CA–5744

January 27, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On March 12, 1991, Administrative Law Judge Marion C. Ladwig issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed cross-exceptions and supporting brief, a brief in opposition to the Respondent's exceptions, and a motion to strike portions of the Respondent's exceptions and appendix. The Respondent filed a motion in opposition to the General Counsel's motion.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order as modified.[4]

1. We find merit to the General Counsel's exception to the judge's failure to address the record evidence indicating that Manager Gonzalo de Varona, in the presence of Human Resources Director Luisa Palli, stated to several employees on or about January 28, 1988, that anyone signing authorization cards would be fired. This threat was described by discriminatee Francisco Perez, whose testimony was generally credited, and the relevant testimony was unrebutted by de Varona, who also testified at the hearing. Accordingly, we find that the Respondent's agent made such a statement. It clearly constitutes a threat of reprisal for engaging in protected activity in violation of Section 8(a)(1) of the Act.

2. In affirming the judge's finding that the Respondent engaged in unlawful surveillance by posting one or two security guards near the employee entrance and another security guard with binoculars in an upstairs hotel room in order to observe employees and union agents soliciting union authorization card signatures across the street from the hotel, we find no merit to the Respondent's contention that this surveillance was lawful since the employees' activities were open and in public. Rather, we find that the Respondent's surveillance activity, particularly its posting of a guard with binoculars,[5] constituted more than ordinary or casual observation of public union activity. There is no evidence that the Respondent's conduct was based on safety or property concerns.[6] We therefore find that the Respondent engaged in surveillance in violation of Section 8(a)(1) of the Act. See *Arrow Automotive Industries*, 258 NLRB 860 (1981).

AMENDED CONCLUSIONS OF LAW

Add the following Conclusions of Law 3 and 4 and renumber the remaining paragraph.

''3. By informing employees they were discharged for engaging in protected concerted activities, the Company violated Section 8(a)(1).

''4. By threatening employees with discharge if they signed union authroization cards, the Company violated Section 8(a)(1).''

[1] We grant the General Counsel's motion to strike portions of the Respondent's exceptions and appendix and deny the Respondent's motion in opposition thereto insofar as the Respondent seeks to introduce evidence which could have been submitted at hearing.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolution unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. The Respondent also asserts that the judge's conduct of the hearing shows that he was biased against the Respondent's counsel. Upon full consideration of the record, we perceive no evidence that the judge prejudged the case or demonstrated any bias in his conduct of the hearing or his analysis or discussion of the evidence. Accordingly, we find no merit in the Respondent's allegation of prejudgment and bias on the part of the judge.

[3] We shall amend the judge's conclusions of law to include the additional 8(a)(1) violation we find and the 8(a)(1) violation the judge found but inadvertently omitted from the conclusions of law.

[4] The judge recommended that the Board issue a broad order requiring the Respondent to cease and desist from violating the Act ''in any other manner.'' We note that the General Counsel did not request broad injunctive relief and we do not find the Respondent's conduct in this case egregious enough to warrant the issuance of such an order. Accordingly, we are issuing a narrow cease-and-desist order requiring the Respondent to cease and desist from violating the Act ''in any like or related manner.'' See *Hickmott Foods*, 242 NLRB 1357 (1979).

In agreement with the General Counsel, we shall order that the notice to employees be posted in both English and Spanish at the Respondent's facility.

[5] It is the out-of-the-ordinary character of this activity that distinguishes this case from *Emenee Accessories*, 267 NLRB 1344 (1983), where the Board found no unlawful surveillance because an employer representative simply stood in front of the employer's building and watched union organizers conversing with employees.

[6] Therefore *McGraw Edison Co.*, 259 NLRB 702, 716 (1981), does not support the Respondent's position. There, the Board affirmed the judge's finding that the presence of supervisors in the employer's parking lot while organizers engaged in soliciting cards was lawful, since the employer had reason to anticipate violence on its property, and an altercation requiring police presence in fact did occur. In the instant case, there was no evidence that the Respondent had any reasonable expectation of violence or of damage to its property.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, S.J.P.R., Inc. d/b/a Sands Hotel and Casino, San Juan, Puerto Rico, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(e) and add the following paragraphs 1(e) and (f).

''(e) Threatening employees with discharge if they signed union authorization cards.

''(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.''

2. Substitute the following for paragraph 2(d).

''(d) Post at its facility in Isla Verde, Carolina, Puerto Rico, copies of the attached notice marked ''Appendix'' in English and Spanish.[3] Copies of the notice, on forms provided by the Regional Director for Region 24, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in the conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.''

3. Substitute the attached notice for that of the adminstrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Union De Trabajadores de la Industria Gastronomica de Puerto Rico, Local 610, Hotel Employees and Restaurant Employees International Union, AFL–CIO or any other activity.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in protected concerted activity.

WE WILL NOT engage in surveillance of our employees' union and other protected concerted activities.

WE WILL NOT inform employees they were discharged for protected concerted activities.

WE WILL NOT threaten employees with discharge if they sign union authorization cards.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Jose Dominguez, Ismael Ithier, Jesus Lopez, and Francisco Perez immediate and full reinstatement as permanent employees to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL notify each of them that we have removed from our files any reference to his termination and that the termination will not be used against him in any way.

S.J.P.R., INC. D/B/A SANDS HOTEL AND CASINO, SAN JUAN

Harold E. Hopkins Jr., Esq., for the General Counsel.
Maria Milagros Soto, Esq., of Santurce, Puerto Rico, for the Respondent.
Norman Pietri, Esq., of San Juan, Puerto Rico, for the Union.

DECISION

STATEMENT OF THE CASE

MARION C. LADWIG, Administrative Law Judge. This case was tried in Hato Rey, Puerto Rico, on September 28–30, 1988, and from June 25 to July 6, 1990. The charge was filed February 12, 1988 (amended March 24 and at the trial), and the complaint was issued March 25, 1988, and amended at the trial.

On January 27, 1988,[1] employees Jose Dominguez, Ismael Ithier, Jesus Lopez, and Francisco Perez led a protest against the Company's requiring kitchen employees to sign a second 90-day temporary contract instead of giving them permanent employment and medical and other benefits as promised. The Company scheduled an employee meeting with the general manager the next day to discuss the complaints. Later that evening, after a security guard overheard the four employees' plans to go to the Union for advice, the Company canceled the scheduled meeting and began replacing them immediately.

The primary issues are whether the Company, the Respondent, (a) discharged the four employees because of their union and protected concerted activities, (b) informed three of them that they had been terminated because of these activities, and (c) engaged in surveillance and other coercive conduct, violating Section 8(a)(1) and (3) of the National Labor Relations Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Company, I make the following

[1] All dates are in 1988 unless otherwise indicated.

FINDINGS OF FACT

I. JURISDICTION

The Company, a corporation, operates a hotel and casino in Isla Verde, Carolina, Puerto Rico, where it annually derives over $500,000 in gross revenues and receives goods valued over $50,000 directly from outside Puerto Rico. The Company admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

1. Promise of permanent employment and medical benefits

In the absence of Executive Chef Theodore Paul and Executive Sous Chef Robert Roehrich at the trial, the evidence is unrefuted that they promised employees Jose Dominguez, Ismael Ithier, Jesus Lopez, and Francisco Perez, as well as other kitchen employees, permanent employment after 90 days if the employees received favorable evaluations.

Jose Dominguez. Chef Paul told cook Dominguez that he would get a permanent position in 3 months and be given medical benefits and a 50-cent raise (Tr. 288).

Ismael Ithier. Sous Chef Roehrich told pantry chef Ithier that he would have a probationary contract, would be given three evaluations and, according to those evaluations, would be made a permanent employee and would receive benefits and a wage increase (Tr. 56, 60, 151). Roehrich gave Ithier a list of the benefits (G.C. Exh. 10), on company stationery (see R. Exh. 30) and headed ''EMPLOYEE BENEFITS.'' The list included medical and life insurance and 10 holidays. These benefits are identical to the benefits listed in a newsletter distributed later at a Christmas party (R. Exh. 18), except that holidays are now called bonus days and a Christmas bonus has been added.

Jesus Lopez. In cook Lopez' interview by Paul and Roehrich, he was told that ''if I passed a 90 days probationary period, I would get a permanent position at work, I was going to be promoted'' and given ''a medical plan and a raise'' (Tr. 567).

Francisco Perez. Similarly, cook Perez was told by Paul that ''after three months I would be made a permanent employee'' and given a $1 raise and a medical plan (R. Exh. 5A at 1; Tr. 386–389).

The evidence does not reveal whether similar promises were made to employees by the heads of other departments at the opening of the new hotel and casino on November 1, 1987.

2. Signing of ''temporary'' contracts

a. *Temporary or permanent employment*

The four employees (Dominguez, Ithier, Lopez, and Perez) and other kitchen employees routinely signed the temporary employment agreement along with other papers, unaware that the ''temporary'' contract could be construed contrary to their promised permanent employment. None of them was given a copy.

The Company asserts in its brief (at 97–98, 113) a distinction between types of contracts under Puerto Rican judicial and statutory law. It asserts that employee protection in Puerto Rico from termination, except for just cause, applies to indefinite-term (permanent) employees after a 90-day maximum probationary period. According to the Company, this protection extends only (a) to employees that are not dedicated to ''seasonal or incidental'' jobs, (b) when services are not to be rendered ''within a determined period of time,'' and (c) to certain definite-term contracts that may ''create an expectancy of continued employment.'' Under the statutory law, ''transitory [temporary] employees do not enjoy rights to continued employment.''

Here the Company provided the ''temporary'' contract form for all its new hourly employees to sign as part of the employment papers, even though it employs many or most of its employees year round. For example, at the peak of the season in late January the Company employed a total of 44 kitchen employees (G.C. Exh. 23). Human Resources Director Nilda Vazquez Becerril estimated the number to be 40. She admitted that during the slow summer season (when the occupancy was about 70 to 80 percent) and until the next February 1989 when she left the Company, there was about ''the same number'' (Tr. 1473).

The Company does not explain, in these circumstances, how the hourly employees could be considered ''transitory [temporary] employees'' or employees having ''seasonal or incidental'' jobs, how their services could be rendered ''within a determined period of time,'' or why the contracts (if construed actually to be for a definite term) would not ''create an expectancy of continued employment.'' At this stage of the proceeding, however, I do not find it necessary to rule on whether the employees became permanent employees after 90 days of employment.

b. *The contractual language*

Human Resources Director Becerril (a lawyer) prepared (Tr. 1444–1445) the ''Temporary Employment Agreement'' both in English (R. Exh. 4) and in Spanish (G.C. Exh. 48). The English version, which the four employees signed, has printed near the top under ''Conditions of Employment'' the following:

> A. VARIABLES
> Period of Employment: Less than 90 days or a maximum of ____days.

The Spanish version, under ''VARIABLES,'' reads (in Spanish): ''Period of Employment: From ____ to ____.'' I note that the Spanish version was signed by another kitchen employee, cook Italo Sibilia (G.C. Exh. 48), and that at least by the time of trial, the blanks after ''Period of Employment'' had been filled in (as discussed below).

The first of the following 10 paragraphs of the temporary employment agreement (a one-page, single-spaced, legal-size document) reads as follows:

> B. FIXED
>
> 1. Upon execution of this Agreement, the temporary employee accepts the job and work conditions hereinafter described *during the temporary period of employment*, fully understanding that no promise of regular

> employment has been made. Temporary employees will compete for regular jobs, which will be awarded when available on the basis of performance and employee's qualification. The Hotel may discretionally terminate the employment contract prior to the maximum term of employment if or when the employee services are no longer required. [Emphasis added.]

Although this paragraph refers to a ''temporary period of employment,'' the maximum number of days had been left blank after ''Period of Employment'' in the contracts that Dominguez, Ithier, and Lopez signed. Moreover, as they credibly testified, the space after ''Specify any special conditions'' near the bottom of the page was also blank when they signed the documents.

Therefore, there was no definite ''temporary period of employment'' stated in the document when signed. At some undisclosed later time, the space after ''Specify any special conditions'' was filled in to read: ''Contract expires [date],'' with the date of February 7 for Dominguez (R. Exh. 2), January 29 for Ithier (R. Exh. 1), and February 1 for Lopez (R. Exh. 7), 93 days (instead of 90 days) after the November 1 signing date in his contract.

Dominguez' contract shows on its face that these words and date after ''Specify any special conditions'' were obviously inserted by someone other than the person who filled in the employment data at the top of the page and the signing date at the bottom. The handwritten 7's at the top (by Dominguez, Tr. 247) and at the bottom are typical (American) sevens, whereas the insert has the barred (European) handwritten seven: ''Contract ends 2/7/88.''

Human Resources Assistant Director Luisa Palli (whose credibility is discussed below) claimed that she filled in the maximum of ''90'' days and the ''Contract ends 1/29/88'' in Perez' contract in his presence (Tr. 1292–1293).

c. *Contracts signed*

None of the four employees read the employment contract before signing it.

Jose Dominguez (who testified in English) credibly testified that the title ''Temporary Employment Agreement'' just ''didn't sink in. . . . It was so quick when [Theodore Paul] hired me . . . that I just went to Personnel . . . and lay my name [on] many papers. Believe me, if I would have known this was a temporary agreement, I would not have signed it.'' (Tr. 340.) He also credibly testified that he did not read the contract and that if he had seen the handwritten ''Contract ends 2/7/88'' in the contract, showing that it would end in 3 months, ''I would not have had [anything to do] with Paul . . . or the Sands Hotel per se'' (Tr. 338–339, 364–365).

Ismael Ithier (who testified in Spanish) credibly testified that he did not read the contract, but ''As far as I'm concerned, this is a probationary employment contract'' because of what Sous Chef Roehrich promised him. One of the secretaries in the personnel (human resources) office ''who gave me this contract told [me] 'Fill out this part and sign here and write the date here,' and that was it.'' Immediately ''after I filled out the heading and I signed it I gave it to the [secretary].'' The maximum number of ''90'' days and the sentence ''Contract ends Jan. 29, 1988'' had not been filled in. Human Resources Director Becerril, who later signed the document, was not present. (Tr. 152–154, 160–161.)

Jesus Lopez (who testified in Spanish) also signed the English version of the employment contract (R. Exh. 7), which has the maximum number of days left blank and in which (as the Company agrees, Tr. 656) the sentence ''Contract expires Feb. 1/88'' is written in a different color of ink. Lopez credibly testified that he signed only his name, that Becerril's secretary filled in the employment data at the top, and that Becerril signed the contract in his presence (Tr. 655–657). Lopez did not read the document and nobody read it to him (Tr. 959). I note that on his union authorization card (G.C. Exh. 22), which is printed in Spanish, he wrote the name of his department as ''Kichent'' (for Kitchen). As he credibly testified (in Spanish), ''I don't know English that well'' (Tr. 672).

When called as a defense witness, Human Resources Assistant Director Palli (now the director) testified that she wrote the names of the department and supervisor (on the line below the employment data), the sentence ''Contract expires Feb. 1/88'' (near the bottom of the page), and the signing date in Lopez' contract (Tr. 1299).

Although the Company contends in its brief (at 15) that Palli ''filled out the blanks in Lopez' temporary contract in his presence'' (citing Tr. 1298), that transcript reference is to Palli's testimony about another document in Lopez' file, not about the execution of his contract. Palli did not confirm the company counsel's later statement, in a preface to a question about Lopez' contract: ''So, at that time where you interviewed Mr. Lopez, you filled out his contract'' (Tr. 1302).

Furthermore, the Company offered no explanation for the sentence ''Contract expires Feb. 1/88'' being written in a different colored ink, if in fact Palli had filled in that sentence in Lopez' presence when she wrote the name of the department and supervisor near the top of the page. I find that Palli was not present when Lopez signed the contract and gave it back to the secretary, and that Palli inserted the sentence sometime later.

I note that there is some indication that when cook Italo Sibilia signed the Spanish version of the contract (G.C. Exh. 48), the dates may not have been filled in (under ''VARIABLES'') to read, in Spanish: ''Period of Employment: From 11/1/87 to 1/30/88.'' Those handwritten dates and the handwritten sentence ''Contract expires 1/30/88'' near the bottom, if filled in, may have been sufficient to alert him to question whether the contract was not merely a temporary contract for a 90-day probationary period, but was instead a definite-period contract expiring on January 30.

Although Sibilia did not testify, both General Counsel and company witnesses testified that he was present in the January 27 protest meeting in Executive Chef Martin Maurer's office (discussed below). It is also undisputed that in the protest meeting, he complained that he had left a permanent position at another employer (Tr. 83). Like other kitchen employees, he undoubtedly believed he had been promised permanent employment after a favorable 90-day probationary period. Either the dates of employment had not been filled in when he signed the contract, or they were filled in and he did not construe the contract in the way the Company does.

Francisco Perez (who testified in Spanish) was given the English version to sign, even though the ''Recruitment Inter-

view Record'' in his personnel file (G.C. Exh. 7D; Tr. 1284) bears the comment: ''Eng[lish] poor.'' Perez, who speaks and reads little English (Tr. 494), demonstrated on cross-examination that he did not attribute the same significance to the ''temporary'' contract that the Company attributes to it. On being asked the difference between a ''90 days probation period for regular employment versus or against 90 days definite period of time or temporary period,'' he credibly stated his belief that ''it's the same'' (Tr. 515–516).

Both Becerril and Palli testified (Tr. 1286, 1293, 1302, 1304, 1380, 1451) that when explaining the employment contract to new employees, they used language similar to the contract language: that is, that it was a temporary contract for 90 days and that employees would be competing for regular jobs. This, of course, would not specifically disavow the promises made by Chef Paul and Sous Chef Roehrich to the kitchen employees that if their evaluations were favorable, they would be made permanent employees after the 90-day probationary period.

Palli, however, went further at one point in her testimony. She claimed (Tr. 1288) that she told employees

> That depending on evaluations, they will be appointed to a *renewal* [presumably a second temporary contract] or depending on evaluations, that will be the end of the contract or if the time arise[s] for giving a regular contract and the candidate [has] merit for that appointment, they will have all the benefits, the fringe benefits that the Company will give to their regular employees. [Emphasis added.]

I discredit her claim that she mentioned a ''renewal'' or a second temporary contract. Undoubtedly, if she had, this case would not have arisen. The kitchen employees would not have been so upset on January 27 (as discussed below) when they heard that most of them were being given a second temporary contract instead of a regular contract with permanent status. (Whereas Dominguez, Ithier, Lopez, and Perez, by their demeanor throughout their lengthy testimony, impressed me most favorably as being honest witnesses, endeavoring to give their best recollections, Palli impressed me most unfavorably as a witness. By her demeanor on the stand she appeared willing to give any testimony that might help the Company's cause.)

Despite Palli's claim that she told new employees about a ''renewal'' of their temporary contracts ''depending on evaluations,'' she gave testimony at one point that revealed the employees were expecting permanent employment after 90 days. She admitted that one of the kitchen employees, cook Victor Perez, became ''very upset for the renewal of contract'' on January 27 and threatened to resign ''if I have to sign a renewal'' (Tr. 1427–1428)—before learning that he was being given a permanent contract.

The Company also presented other testimony confirming that kitchen employees were expecting permanent status after 90 days of employment. When called as a company witness, cook Rafael Caraballo testified (Tr. 1066):

> Q. [By Attorney Soto] Okay. Mr. Caraballo, could you tell us what, to the best of your recollection, towards the end of January in the kitchen, related [to] the renewal of the temporary contracts?
>
> A. It was rumored in the kitchen that . . . *certain permanent positions* were going to be given. And *I thought it was for everybody*, you know. But it wasn't like that. And as it was not so, many people in the kitchen were upset, *including myself*. [Emphasis added.]

I discredit the testimony by cook Carlos Rivera (whose credibility is discussed later) that he was told when hired that ''not all the employees would receive the regular position or permanency the same day,'' but ''they were going to be awarded . . . in steps, slowly'' (Tr. 1179).

I find it unnecessary to decide at this stage of the proceeding whether the ''temporary'' contract was a lawful avoidance or an ineffectual evasion of the Puerto Rican statutory law that gives permanent employees protection from termination (except for just cause) after a 90-day probationary period. I also find it unnecessary to rule on the General Counsel's argument in his brief (at 7) that ''This background clearly demonstrates that [the Company] . . . to attract and hire well qualified hotel workers, knowingly misled its employees.''

I do find that the kitchen employees joined in protesting what they considered to be an injustice.

3. Permanent status for only seven employees

The evidence does not disclose when the Company decided to award permanent status to only 7 of the 44 kitchen employees.

The Company's so-called Christmas Party newsletter (R. Exh. 18) described its medical and other benefits. General Manager Edward Tracy's welcoming message on the front page referred to this ''list of the benefits this company provides you,'' without giving any indication that the Company planned to withhold these benefits, as well as promised wage increases, from a large majority (84 percent) of its kitchen employees by keeping them on temporary status. The message read:

> Dear Employee:
>
> It is with great joy that we celebrate a job well done and have an opportunity for sharing the joys of the Holiday Season with the promise of the New Year.
>
> Enclosed you will find *a list of the benefits this company provides you*, along with conventional benefits mandated by law. Soon, you will have a Handbook that will explain in detail these benefits. Once you receive it, get acquainted with all the benefits and if you have any questions regarding them, do not hesitate to contact us.
>
> Once more, thanks for a job well done and enjoy the Holiday Party! [Emphasis added.]

On January 12, however, the Company in effect announced to its managers and supervisors a repudiation of the promises by Chef Paul and Sous Chef Roehrich that kitchen employees would be given permanent status, with medical benefits, after 90 days if they received favorable evaluations. In a memo approved by Tracy, Human Resources Director Becerril notified ''All Department Heads/Managers/-Supervisors'' as follows (R. Exh. 20):

> As all of you know, most of the temporary contracts of our hourly personnel end next January 29, 1988.
>
> On account of this, it is imperative that *evaluations for the first 90 days* of operation are completed and returned to the Human Resources Office at least one week before January 29, 1987, so that we know in advance whose contracts are going to be renewed, which contracts will be ended and which employees are going to be appointed to regular positions.
>
> It is also of utmost importance that you be aware that a *satisfactory evaluation does not necessarily mean that the person is going to have a permanent position*. There are few permanent positions and all hourly employees are competing for them. Consequently, *you are not to promise regular appointments to anyone*.
>
> Please be advised once more that nobody is allowed to work without a contract because the legal consequences of this is that the person becomes permanent without having to go through a probationary period. [Emphasis added.]

On the same date, Human Resources Assistant Director Palli send memos to department heads, scheduling dates for the contract renewals. The one to Executive Chef Martin Maurer (who meanwhile had replaced Chef Paul in December, Tr. 173) read as follows (R. Exh. 19):

> We have assigned Jan. 27/88 for the renewal of contracts of your Department at Ballroom B from 9:00 a.m. to 9:00 p.m.
>
> Please send all employees up, two by two, during their shifts. All employees must sign their contracts on the assigned date, including those on their days-off, so that our office can plan ahead [for] replacements, if necessary.
>
> We will appreciate your full cooperation on this matter.

Whenever the decision was made to give permanent status to only 7 of the 44 kitchen employees, I agree with the Company that the decision was made before the employees engaged in any union activities.

4. Failure to produce 90-day evaluations

As quoted above, the department heads were notified by Human Resources Director Becerril on January 12 that ''it was imperative that evaluations for the first 90 days of operation are completed and returned to the Human Resources Office at least one week before January 29.''

Although these 90-day evaluations of the four employees were made (Tr. 73, 288, 390, 650) and although all evaluations were subpoenaed (G.C. Exh. 39; Tr. 10), the Company failed to produce any of these last evaluations. Because of this failure and because the Company admitted at the trial (Tr. 629) that the work of the four employees (who were offered a second temporary contract) was ''satisfactory,'' I infer that all four of the 90-day evaluations were favorable to continued employment.

In fact, Jose Dominquez was the receiving training for framation to the position of garde manger (Tr. 288–289). This position (a cook in charge of cold-dish preparation) was then held by cook William Rivera, a company witness (Tr. 1248–1249, 1255, 1260–1262). *Francisco Perez*, who had 15 years of experience in Italian cuisine (Tr. 387), was a particularly valuable employee, cooking for the high-quality Leonardo's Restaurant (Tr. 397, 908). All three of his evaluations (none of which was produced) were excellent (Tr. 390), with all the factors marked in the ''Outstanding'' column (Tr. 392; G.C. Exh. 20). When Executive Sous Chef Douglas Page (who did not testify) gave *Ismael Ithier* his last evaluation, Page marked all the factors in the ''Very Good'' and ''Outstanding'' columns (Tr. 73).

5. Preparations for opposing union

As part of its defense, the Company showed the careful preparations it had made for ''legally'' opposing any union organizational efforts.

As summarized in the Company's brief (at 72–73, 112, 118–119):

> [The Company] rehearsed [an] exercise on unionization, including charts, and a training session by Attorney Peter Pantaleo, a Labor Specialist. It is directed, on the advent of a union drive, to legally discourage unionization . . . .
>
> . . . .
>
> In the case of a new hotel, in the first three years of operation, management expects to lose money because they are highly leveraged through junk bonds that carry a high interest rate. . . . Thus, management must exercise fiscal restraint to minimize these losses and use every legal means to achieve this end.
>
> . . . .
>
> The goal of the [Company] was to maintain a nonunion shop since the first two or three years of operation generally generate losses and the hotel needed the economic flexibility of a nonunion environment. [The Company] needed to make use of *temporary employees, who do not quality for fringe benefits* on a number of positions in order to maintain losses at the lowest range possible. . . . To that effect . . . Pantaleo . . . was hired by the [Company] to train its management on how to maintain a nonunion status in case of organizing efforts. He trained Palli [and two others] on how to address the employees on what they should know about unions in case of organizing efforts. [Emphasis added.]

The perceived importance of preventing unionization was further clarified at the trial. The cost of fringe benefits in Puerto Rico is heavy, adding about 50 percent to the payroll expense (Tr. 845). Under the union agreement, employees become permanent after only a 45-day probationary period (Tr. 1562).

Because of the high unemployment rate in Puerto Rico at the time, a large pool of nonunion replacement employees was available to work as temporary employees. The Company therefore had a strong economic incentive to keep out the Union to avoid the high cost of providing medical and other fringe benefits for employees who, under the Union's contract, would become permanent after 45 days of employment. As stated in the Company's brief (at 103): ''If the employees could not accept the [temporary] contract that was offered, there is a high 22% unemployment market in Puerto Rico that would accept even a temporary job.''

I note that when Human Resources Director Becerril was first asked if ''a major consideration'' for making permanent only seven kitchen employees was ''trying to save on wages for the next three months,'' she answered (Tr. 1466):

> *No, definitely not,* because we're offering them good terms and conditions of employment. We didn't want to . . . make economies on account of their salaries or their terms and conditions of employment. [Emphasis added.]

She later gave various purported reasons for the small number of permanent positions, including the claim that General Manager Tracy ''didn't want to create false expectations'' of permanent employment and ''That's correct,'' the ''major reason for not giving them [medical and other fringe] benefits for the next three months was because it would be disappointing to the employees after that if they were laid off'' (Tr. 1468–1496). Still later she testified (Tr. 1473–1474) when asked if it was true that

> you knew in January 1988, that you'd need more than seven? And isn't it true that you in practice actually needed around 40, and that the only or the major difference between making more of these employees permanent in January and not doing so, was to save on labor costs?
>
> WITNESS: Well, I guess that maybe yes, that was a reason.

Becerril, by her demeanor on the stand, did not impress me as a particularly candid witness.

The Company argued at the trial (Tr. 845):

> What this case is about basically . . . is that four employees out of six hundred or seven hundred that were hired on November 1st, to work at the Sands Hotel, challenged the use of these temporary contracts.

The General Counsel does not challenge the legality of the previously planned conduct of Palli and other company representatives at the January 29 antiunion ''orientation'' meeting in opposing the union organizing drive. The General Counsel does contend that the Company was discriminatorily motivated when—during the evening of the January 27 protest meeting and immediately after the first mention of the Union—it decided to discharge the four employees, Jose Dominguez, Ismael Ithier, Jesus Lopez, and Francisco Perez.

B. *Discharge of Four Employees*

1. The January 27 protest meeting

On Wednesday, January 27, second-shift (3 to 11 p.m.) employees in the kitchen became very upset when they learned that almost all of them were being offered a second temporary contract instead of permanent employment (Tr. 76–81, 175, 290–291, 350, 397–400, 569–571, 660–662, 1250).

After they complained in the kitchen to Chef Martin Maurer (who did not testify), he invited the protesting employees to his office (Tr. 80, 180–181, 291, 400–401, 571, 660, 665). The Company admits in its brief (at 5) that besides the four employees (Jose Dominguez, Ismael Ithier, Jesus Lopez, and Francisco Perez), the others who attended the meeting were cooks Rafael Caraballo, John Morales, Carlos Rivera, and Italo Sibilia. (Tr. 82, 181, 292–293, 401, 572–573, 659–660.) Only the four employees, who led the protests on behalf of the kitchen employees, remained for the entire meeting, which lasted about 1-1/2 hours (Tr. 90–91, 292, 296, 403, 573, 659, 665, 883, 1011–1012, 1476).

Dominguez (who speaks English well) was the employee spokesman in the first part of the office meeting with Maurer (who did not speak Spanish). After a few minutes Maurer was joined by Food and Beverage Assistant Manager Gonzalo de Varona and around 5:30 p.m. by four other company representatives. They were Resident Manager Luis Morales (the ''Executive Assistant,'' acting as general manager in the absence of Edward Tracy), Food and Beverage Manager John Cruz, Human Resources Director Becerril, and Becerril's assistant Gualberto Nater (Tr. 83–85, 184, 292, 401, 878–879, 1004–1005, 1009, 1011, 1043, 1462).

The employees complained, in part, that they had been promised permanent positions, medical benefits, and raises after a 90-day probationary period; that some of them had left permanent jobs to work there; that they did not need a temporary contract because they had already passed the probationary period; and that they had been deceived (Tr. 83, 87–88, 178, 293–294, 400, 402, 404–405, 663–664, 932, 1008, 1475). De Varona urged the employees to keep cool and go ahead and sign the renewal of the temporary contract, but the employees responded that they ''wanted to speak with [General Manager] Tracy'' (Tr. 295, 1014–1015, 1042).

Cruz denied that the employees had been willfully deceived. He stated, in part, that they were ''good employees,'' but ''we had to be very conservative about giving out permanent positions'' to avoid being ''burdened with any extra financial costs of fringe benefits.'' (Tr. 880–881.) He stated there would be only seven permanent positions then, and another eight 3 months later (Tr. 86, 294, 402, 1464).

Becerril (who had prepared the temporary contract forms) stated, in part, that she was entitled to extend the contract for another 90 days (Tr. 91, 295, 402) and ''almost begg[ed] them to sign their contracts because I knew they were good employees and we wanted to keep them there'' (Tr. 1465). She admitted that the employees ''asked to see Mr. Tracy'' and that she told them ''he was out of the country at that moment, but as I understand he was coming back the next day'' (Tr. 1477).

Finally Acting General Manager Morales (who did not testify) arranged with Becerril that a meeting be scheduled for the following afternoon at 2 p.m. in the ballroom for kitchen employees on the three shifts to meet with Tracy. Morales then told the four employees, ''Let's leave this as it is and tomorrow we [will] discuss about the contracts at 2:00 p.m. with all the employees of the department'' (Tr. 88–89, 91–92, 178, 188, 296–298, 405–406, 413, 573, 664; R. Exh. 8A, par. 4, p. 5). This concluded the meeting and the four employees returned to work (Tr. 92, 297, 507, 1015). The four employees admittedly were paid for all the time they spent in the protest meeting (Tr. 665; R. brief at 94).

2. Posted notices of 2 p.m. meeting

About 7 p.m. that Wednesday evening, January 27, Sous Chef Harrison Andrews (who did not testify) posted two large notices in the kitchen, calling a meeting the next day.

They were addressed to all kitchen personnel and read, in effect, ''Meeting at the Ballroom on January 28th, at 2:00 o'clock in the afternoon,'' and were signed ''The Management.'' (Tr. 93–96, 102, 189–190, 298, 414–415, 585; G.C. Exh. 11.)

3. Guards posted in kitchen

That evening, after the January 27 protest meeting in Chef Maurer's office, two security guards (with a walkie-talkie) were posted in the kitchen an hour or two, or longer (as discussed later). One of the guards was standing within a few feet of where Dominguez, Ithier, and Perez were working—listening to their conversation when they and Lopez discussed going to the Union the next day for advice. (Tr. 97–101, 104–106, 201, 300–302, 356, 385, 407–411, 578–580, 1229.)

These two hotel guards, who were on the payroll of a guard company, were assigned and supervised by the Company's own security shift supervisor, Lourdes Santos (706–710, 730, 735, 1151–1152). No guard had ever been assigned to the kitchen before (Tr. 199, 301, 408, 1232).

Neither Supervisor Santos nor either of the guards testified, and the Company failed to introduce Santos' incident report, also as discussed later.

The allegations in the complaint that this and other conduct constituted unlawful surveillance are discussed later as well.

4. Meeting canceled and four employees replaced

About 10 o'clock that evening, January 27, the Company decided to cancel the scheduled 2 p.m., January 28 meeting and to replace the four employees. To find replacements, it decided to place an ad the next day in the newspaper and to begin immediately to search its files of previous applications. (Tr. 908, 1484.) The ad, placed before 11 a.m. the next morning, appeared in the newspaper on January 29 (R. Exh. 46).

The replacements were hired the following week. The Company admits in its brief (at 63) that Hubert Erbacher (for Ithier) signed a temporary contract and began working Monday, February 1; Norman Losier (for Perez) February 3; and Erasmos Rodriguez (for Dominguez) and Ricardo Vega (for Lopez) on Friday, February 5. (Tr. 1489–1490, 1514–1515, 1519, 1521, 1523).

5. Termination form letter

At 2 p.m. on Thursday, January 28 (the previously scheduled time for the meeting with kitchen employees), Human Resources Director Becerril was instead meeting with Company Attorney Vega (Tr. 435), presumably preparing the termination form letter for the four employees. The letter was worded to accept the employees' purported ''decision'' not to sign the second temporary contract.

As originally prepared, this form letter (in Spanish over Becerril's signature, see the letters given Perez and Ithier, G.C. Exhs. 3, 4) included the date January 29 both at the top and in the last paragraph for the contract expiration date (90 days after the November 1 hotel opening). The translation reads as follows (G.C. Exhs. 3A, 4A):

> January 29, 1988
>
> Dear Mr.
>
> We regret very much the *decision* you expressed to us about *not accepting* a renewal of your temporary employment contract with Sands.
>
> At this time we have made an evaluation of the number of employees for an indefinite time which based on the short time we have been operating we can commit ourselves with expectancy of work all year long. The fact that on this occasion you had not been chosen for a regular job did not mean that further on you would not have such an opportunity.
>
> We regret your *decision of not wanting to sign* [a renewal of] the temporary employment contract which expires today January 29, 1988. We wish you success in your employment endeavors. [Emphasis added.]

On the two original form letters the names of Perez and Ithier were inserted, obviously in different type, presumably later in Becerril's office.

The letter to Lopez (G.C. Exh. 5) was the same form letter, except that the entire letter was copied, in different type, with a 1-day earlier date, January 28. As found below, January 28 was the date Becerril gave him the termination letter after Chef Maurer warned him about organizing for the Union during working time (following his attempt that afternoon before work to sign the second temporary contract). The retyped letter replaced the January 29 contract expiration date in the third paragraph of the form letter with the date February 1 which, as found above, was the date (93 days after the November 1 signing date) inserted in his temporary contract after he signed it.

The Company also retyped Dominguez' termination letter (G.C. Exh. 16) with a January 28 date, even though he was not working that Thursday evening. As found below, he went with Lopez that afternoon to sign the new contract, but later went home because it was his day off. (The Company replaced the January 29 contract expiration date with February 7, evidently because Dominguez was hired November 12, R. Exh. 2, not on the November 1 opening date.)

The evidence does not support the contention in the Company's brief (at 54) that ''in the *morning* of the 28th [Becerril] drafted the four termination letters'' (emphasis added). Becerril merely claimed (Tr. 1541–1542, 1543):

> [T]hey were started being drafted on January 28th. There are two letters that are dated January 28th and the other ones were prepared in the morning of January 29th. . . .
>
> . . . .
>
> A. Well, I started . . . I think that two of them were drafted on January 28th and the other ones were drafted on January 29.''

She did not admit that the form letters dated January 29 were prepared on January 28 and that two of the letters were retyped the same day in her office with a January 28 date.

6. Efforts to sign temporary contract

Meanwhile on Thursday morning, January 28, the four employees went to the union hall, signed authorization cards, and obtained other cards to take back to the hotel. The Union advised them to go ahead and sign the second temporary

contract, which could be challenged at a later time. (Tr. 107–110, 117–118, 201–206, 299, 355, 411–413, 516–518, 581–585, 670.)

The four employees then sought to sign the temporary contract.

About 1:30 or 1:45 that Thursday afternoon (over an hour before the beginning of the second shift at 3 p.m.), the four employees and other kitchen employees began arriving to attend the 2 p.m. meeting. (Dominguez came in specifically for the meeting. Thursdays and Fridays were his days off, Tr. 305.) On the way to the meeting, Dominguez, Lopez, Perez, and third-shift (11 p.m. to 7:30 a.m.) cook Juan Delgado met Food and Beverage Assistant De Varona in the kitchen hallway. De Varona informed them that the 2 p.m. meeting had been canceled. (Tr. 303, 586.)

I note that when De Varona was called as a defense witness, he claimed that all he recalled was that he said ''Hi'' to the ''four employees'' (referring to Dominguez, Ithier, Lopez, and Perez) when he saw them ''in or around 12:00 noon, 1 o'clock or 2 o'clock'' (Tr. 1022). On cross-examination he positively denied that they inquired ''about some meeting that was going to happen that day'' (Tr. 1047).

After reading from his pretrial affidavit, however, De Varona admitted that about 1:30 p.m. that day the employees did ask him about ''the meeting with Mr. Tracy.'' He claimed that he sent them to the human resources office. (Tr. 1048.) Thus, he did not admit telling the employees that the meeting was canceled. He did admit that the employees arrived 1-1/2 hours before their 3 p.m. shift for a meeting with the general manager. I discredit his claim that he sent them to the human resources office.

After being told the meeting had been canceled, the employees went toward the kitchen area near the cafeteria. There, other kitchen employees told them that the meeting had been canceled, but ''in the ballroom in Room 2, they are signing contracts and that we should go up there to sign them.'' They then went to meeting room 2 in the ballroom area to sign their second temporary contracts. (Tr. 586.)

Dominguez and Lopez (not Perez) recalled that Ithier joined them on the way to the ballroom area (Tr. 303, 417–418, 587, 1548–1549), but Ithier credibly recalled that he arrived at 1:45 and joined them later. Ithier also credibly recalled seeing two second-shift employees, cafeteria attendant Itza Soto and pantry chef George (Jorge Hernandez or Jorge Vazquez, G.C. Exh. 23) and third-shift cook Juan Delgado, and that they went upstairs together for the meeting. (Tr. 112–115.)

When Dominguez, Lopez, and Perez arrived at meeting room 2 in the ballroom area (R. Exh. 43), Lopez knocked on the door and asked whether this was the place where they were signing the contract. When Palli said yes, the employees asked for their contracts to sign. Palli said she did not have their records there and that she would talk to Chef Maurer, for him to send them in groups of two to sign. She said she did not know why the meeting had been canceled. (Tr. 303–304, 417–418, 587.)

When Ithier arrived at meeting room 2 with other kitchen employees, as Ithier credibly testified, ''We asked her about signing our contracts and she informed us that she did not have the contracts, that later we would be informed, that they were going to call us two by two to sign the contracts'' (Tr. 114, 117). She said that the meeting had been canceled (Tr. 193–194).

I discredit, as fabrications, Palli's claims (a) that she did not see any of the four employees on Thursday, January 28 and (b) that instead, both Lopez and Perez went to the ballroom the day before to sign the contract. She claimed that on Wednesday, January 27, ''When I told [them] they were going to renew the temporary contract, they got mad and said they were not going to sign that type of contract, that they wanted to sign the regular contract with all the benefits.'' (Tr. 1326, 1338–1340, 1546.) She further claimed that this happened ''around 5:00, between 5:00 and 6:00''—which was the *same time* they were in the protest meeting in Chef Maurer's office. (Tr. 1326, 1546.)

I credit Perez' rebuttal testimony that he and Lopez had no conversation with Palli on January 27 about signing another contract (Tr. 1547).

I note that the Company misconstrues Palli's testimony to mean that Perez and Lopez were still refusing after the protest meeting to sign the second temporary contract. It asserts in its brief (at 42): ''According to Palli, only Perez and Lopez went up to sign their contracts on January 27 after 6:00 p.m. and refused to sign the contract. . . . This means that they went AFTER the meeting at the Chef's office, taking into account the time-lapse frame.''

On leaving the ballroom area on January 28, the four employees met and discussed the fact that nobody had given any reason for canceling the meeting. As other employees arrived for the meeting, they informed them that the meeting had been canceled and that they were told the Company was ''going to call us later to sign the contract.'' They then went to the human resources office to ask Director Becerril why the meeting had been canceled, but she evidently had not returned from the attorney's office. Dominguez went home for his day off and the other three employees went to work, awaiting calls to sign the new contracts. (Tr. 115–116, 304–305, 418–419, 435, 588.)

The four employees were never called, as promised, to sign the temporary contract. They were terminated instead.

The Company contends in its brief (at 48):

> There is no evidence that when [Dominguez, Ithier, Lopez, and Perez] went to Personnel [the human resources] office looking for [Human Resources Director Becerril] on the 28th, they told someone there that they were there to sign the contract, *or else they would have been allowed to sign.*

During the trial the Company took the inconsistent position (as discussed later) that 9 o'clock the evening before, Wednesday, January 27, was the deadline for them to sign or agree to sign the temporary contract.

7. Termination of Jesus Lopez

a. *Warning on union organizing*

Lopez was the first one of the four employees to be given the termination letter. This occurred shortly after Chef Maurer warned him about organizing for the Union during working time.

After Lopez went on duty at 3 p.m., Thursday, January 28 (the same afternoon that he went to the ballroom area to sign

the second temporary contract), he began soliciting for the Union. About 5:30 he showed Carlos Rivera a union card and became engaged in a name-calling incident with him. (Tr. 588, 593.)

In the incident, after overhearing Carlos Rivera saying ''everybody from the Union is a son of a bitch,'' Lopez called him a ''vende patria,'' translated as a traitor or a country seller or betrayer (Tr. 591–592). Regarding Chef Maurer's knowledge of the incident, Carlos Rivera testified (Tr. 1218):

> Q. And . . . Chef Maurer knew about that incident too, didn't he?
>
> A. Yes.
>
> Q. Did you . . . go to Chef Maurer and tell him what had happened at that incident?
>
> A. He was in the area during the incident and since he didn't understand Spanish, someone said it to him in English.
>
> Q. Who said it to him in English, Willy [garde manger] William Rivera?
>
> A. Yes, sir.
>
> Q. And Willy Rivera also told Chef Maurer, at that time, that . . . the problem arose over the fact that Jesus Lopez had union cards with him, didn't he?
>
> A. Yes, that's true. [Emphasis added.]

Chef Maurer (who did not testify) said nothing to Lopez at the time. About 6 p.m. just before Lopez' meal break, however, Maurer called Lopez into his office and asked if Lopez was promoting the union inside the hotel. Lopez answered yes. Maurer warned him that he could do so only during breaktime in the employee cafeteria or outside the hotel. Maurer did not mention the name-calling incident. (Tr. 589–590, 594, 1256.)

On leaving Maurer's office, Lopez spent the first 10 or 15 minutes of his meal break in the cafeteria, then went across the street where Ithier was moving his car. There, while still on their meal break, Lopez introduced Ithier to Union Business Agent Ruben Davila, who was handing out union leaflets and authorization cards. (Tr. 202–203, 594, 1568–1569.) A company witness, cook Caraballo, acknowledged seeing Lopez and Ithier with Davila across the street from the hotel and recalled that ''It must have been the day after'' the January 27 protest meeting (Tr. 1100–1101).

b. *The termination*

Sometime between 6:30 and 7 o'clock that Thursday evening, January 28, after Lopez returned from his meal break, Chef Maurer sent him upstairs to the human resources office, where Palli had Security Director Rafael Rodriguez accompany him and Ismael Ithier to General Manager Tracy's office (Tr. 588, 595–596, 689–690).

I note that Lopez erroneously recalled at the trial that Maurer sent him instead to the ballroom (Tr. 595, 589). This error was corrected, however, by the Company's own evidence, consisting of Lopez' pretrial statement (given over 2 years before he testified). The statement (R. Exh. 8A, p. 6) states: ''On Thursday evening, the chef [Maurer] said . . . to go upstairs to the contract office [the human resources office],'' where Palli ''sent a security'' with Lopez and Ithier to Tracy's office.

Security Director Rodriguez claimed that ''if I escorted'' Lopez and Ithier upstairs to Tracy's office, ''it wasn't during the night''—without indicating whether he considered the early evening (6:30 or 7 p.m.) to be ''during the night.'' In one answer he claimed, ''I don't have that incident clear in my mind.'' In another answer he testified that ''[Becerril] and I think it was during the morning'' and ''I think it was in the morning.'' Becerril later claimed it was Friday afternoon. (Tr. 1147–1148, 1495.) I credit Lopez' testimony that it was after his meal break that Thursday evening.

Lopez was sent into Tracy's office first, while Ithier waited in another room. There, in Tracy's absence, Human Resources Director Becerril terminated him. As Lopez credibly testified, Becerril ''said that based upon what the spokesman [at the January 27 protest meeting] had said and based upon the fact that we refused to sign the contract . . . . we are going to do without your services.'' He protested: ''I never refused to sign the contract.'' (Tr. 597–598, 690; R. Exh. 8A, p. 2.)

Becerril said that she was very sorry, but it was their (the Company's) decision and if he wanted, they would pay him that night what was owed him. He responded, however, that ''I was a gentleman and that I would finish my work [until] the end of the 90 days.'' Becerril then gave him the termination letter dated January 28 and said she would consider him if a position as cook arose in the future. He left and returned to his working area. (Tr. 599–600; R. Exh. 8A, pp. 2–3.)

As quoted above, the termination letter refers in both the first and last paragraphs to the employee's ''decision'' not to sign the new temporary contract. The letter given Lopez (G.C. Exh. 5), as found, is a copy of the January 29 form letter, changing the date at the top to January 28 and the expiration date in the last paragraph from January 29 to February 1 (the date in the sentence ''Contract expires Feb. 1/88,'' which was inserted in Lopez' November 1, 1987 temporary contract, R. Exh. 7, after he signed it).

On reaching his working area, Lopez told ''Chef Bob'' (Sous Chef Robert Roehrich, who did not testify) that he was not feeling well (''because I had been given a dismissal letter'') and asked to be excused. As he was signing out, he saw Sous Chef Harrison Andrews (who did not testify) standing nearby. ''I told him I was leaving and he signed something on the sheet.'' (Tr. 601–602, 690–691.)

I note that the attendance sheet for Lopez on Thursday, January 28 (G.C. Exh. 23, p. 5), shows the name ''Harrison'' over the hours from 3 to 6 p.m. (when Lopez took his meal break). Thus, this documentary evidence appears to support Lopez' testimony that the first time he left work early that week was that Thursday evening, after Becerril gave him the termination letter.

c. *Disputed date*

Despite the January 28 date on Lopez' termination letter, the Company produced evidence that Becerril terminated him instead on January 29.

I note that this would still be before Becerril claimed she had any knowledge of the four employees' prounion activities or sympathies. She claimed ''I learned about that . . . when I was informed that they were in the cafeteria distributing union cards'' (Tr. 1539). She was referring to Lopez' and Perez' union organizing in the cafeteria during the meal

break the next evening, Friday, January 29 (as discussed later)—*following* the Company's Friday afternoon antiunion ''orientation'' meeting at which her assistant Palli was the main speaker (Tr. 1341–1344, 1350).

When testifying as a defense witness, Becerril claimed that she called Lopez, as well as Ithier and Perez, to General Manager Tracy's office on Friday afternoon, January 29. She testified that she told them individually that she regretted their decision, that ''we decided to let their contracts expire on their own terms,'' and if their contracts did not expire until a later date, they could remain until that date or be paid for the whole period of time. (Tr. 1495–1497.)

Becerril offered no explanation for dating Lopez' termination letter January 28, other than claiming (as quoted above) that the letters ''were started being drafted on January 28,'' that two were dated January 28, ''and the other two were prepared in the morning of January 29.'' In fact, as found, the two January 29 letters were the form letters and the two letters dated January 28 were copies.

I infer that on January 28, after Becerril returned from the attorney's office, Chef Maurer informed her about Lopez' soliciting for the Union; that she then had the termination form letter for Lopez copied, changing the January 29 date to January 28; and that she gave the letter to him a day earlier than planned, hoping that although he had not been replaced, he would leave the hotel with pay for the remaining two workdays of his November 1 temporary contract.

d. *Lopez sent home early*

Lopez reported to work at 3 p.m. on January 29 and 30 (G.C. Exh. 23, p. 5). At his meal break on January 29, he solicited on behalf of the Union, as discussed later.

Before meal time on Saturday, January 30, Chef Maurer (who did not testify) called Lopez to the office and said ''the management had told him that they did not want me to continue working there.'' Lopez signed out at 5 o'clock, but changed the sign-out time from 5:00 to 11:00 (as the attendance sheet shows, G.C. Exh. 23, p. 5) when Maurer said ''you're going to get paid the eight hours.'' Maurer then gave him a contract-expiration letter. (Tr. 610–616, 692.)

This letter (G.C. Exh. 24; R. Exh. 8A, p. 3) was a typed form letter, in Spanish, signed by Becerril. Lopez' name and the date January 29 were in handwriting. The translation reads (G.C. Exh. 24A):

> Dear Mr.
>
> As you are aware, your employment contract with us expires today.
>
> We take advantage of the occasion to thank you for the services rendered while you worked for us.

This contract-expiration form letter was obviously prepared for Chef Maurer to give to any of the four terminated employees who continued to work until the expiration of their temporary contracts. As found later, it was the same form letter that Maurer gave Dominguez earlier that afternoon when telling him his services were being terminated.

8. Termination of Ismael Ithier

Human Resources Director Becerril terminated Ithier on Thursday, January 28, about 10 minutes after terminating Lopez, following their 6 p.m. meal break.

Ithier recalled that on January 28 after starting to work, he was sent by Chef Maurer to the personnel (human resources) office, where Assistant Director Palli said they were going to General Manager Tracy's office. There, Lopez entered the office first and Security Director Rodriguez had Ithier wait in the next office about 10 minutes. (Tr. 120–122.)

When Ithier entered Tracy's office, Becerril said ''she regretted the decision I had taken of not signing the new contract and that if I wanted, I could leave at that time or if I wanted, I could finish my contract.'' Ithier responded that ''at no time . . . had I refused to sign the contract because I needed my job and I needed my benefits, mostly that of the medical insurance because I was the head of a family.'' She did not answer, but gave him the termination letter. (Tr. 122–124.)

Becerril testified that ''Ithier did ask if I would let him at that moment sign a contract and I said no,'' for two reasons (Tr. 1496, 1544). First, she claimed that she refused ''because I had already made commitments with a person to substitute for him''—although Ithier's replacement, Hubert Erbacher, did not file an application (showing that he was unemployed) until 4 days later, February 1 (G.C. Exh. 58B; Tr. 1521–1522). Second, ''because he said that he would sign a contract but he kept on saying that he needed [the] medical plan and other benefits'' and ''I really understood that he wasn't asking for a temporary contract but for a regular one''—although the evidence is clear that the Company had decided to replace all four employees and had refused to permit them to sign the temporary contract earlier that day.

I note that Ithier's termination letter (G.C. Exh. 4) was not one of the two letters dated January 28. (One January 28 letter was the copy addressed to Lopez, as discussed above, and the other was the copy addressed to Dominguez, who had met with Palli about 2 o'clock that afternoon but who did not report to work on the 3 o'clock shift because that was his day off.) Ithier's letter was the original form letter dated January 29.

I infer that Becerril had planned to terminate both Lopez and Dominguez that day, but that she decided to terminate Ithier in Dominguez' absence, using the form letter dated the next day. Ithier's temporary contract (R. Exh. 1), as filled in by the time of trial, showed that it expired January 29. It had in handwriting the maximum of ''90'' days, the sentence ''Contract ends Jan. 29, 1988,'' and the signing date of November 1, 1987. (It also showed the ''Date of Employment'' to be ''Oct 20/87,'' which was the beginning of Ithier's training period.) In the absence of a replacement, however, he was permitted to work through January 30, 1 day beyond the stated 90-day expiration date (G.C. Exh. 23, p. 5).

9. Termination of Francisco Perez

a. *Identified with Union*

By Friday afternoon, January 29, Chef Maurer was aware that Becerril was using General Manager Tracy's office rather than her own office, where Maurer had sent both Lopez and Ithier the day before to be terminated. About 3 p.m. he sent Perez directly to Tracy's office, accompanied by a supervisor, Sous Chef Ricardo Morales, who happened to be a good friend of Perez (Tr. 432–434, 535–537).

It is undisputed, as Perez credibly testified, that on the way to Tracy's office, Morales (who did not testify) told Perez that ''I was a very good employee but that I had *identified myself with the union* and that he was sorry about that'' (emphasis added).

The Company, after stating in its brief (at 66) that ''we neither deny nor admit'' this conversation, argues that this ''innocuous'' statement, if made by ''this officer,'' is not ''enough to be considered an admission of motive.'' I disagree and find that the statement tends to reveal not only the Company's discriminatory motivation for terminating the four employees, but also to reveal the widespread knowledge of the motivation among the supervisors.

b. *The termination*

In Tracy's office, as Perez credibly testified, he asked Becerril why she did not attend the 2 p.m. meeting the day before and told her ''we wanted to find you'' but never saw her. ''She . . . told me that she was at a meeting with Attorney Vega.'' (Tr. 435.)

Becerril then told Perez ''that since I had refused to sign the three months' contract, she was issuing me a dismissal slip. And I told her . . . I was never offered a contract nor the opportunity to sign it.'' Becerril stated ''that that was the decision that they had made'' and gave him his termination letter. She said he could continue working, and he worked that, his last shift. (Tr. 436, 438.)

Between 2 and 3 p.m. the next day, January 30, Perez and Lopez returned to the hotel for their vacation pay (Tr. 617). Perez asked Becerril ''to make me another letter'' because the termination letter ''should not say that I did not want to sign the contract''; that meant that he was not entitled to unemployment compensation. As the Company admits in its brief (at 79), Becerril refused to change the letter, stating ''that that was what had been determined [by the management].'' (Tr. 451–452, 478.)

10. Termination of Jose Dominguez

When Dominguez reported to work Saturday afternoon, January 30, he saw posters in the kitchen reading: ''Do not sign union cards, the union is the fool of fools'' (Tr. 315).

About 2:50 p.m., 10 minutes before the starting time, Chef Maurer (who did not testify) handed him a note and said ''that my services were being terminated by the hotel,'' without giving any reason. Dominguez did not ''read it fully,'' but saw that ''it was my termination form.'' (Tr. 316, 361.) I find that the note was the same contract-expiration form letter (stating ''As you are aware, your employment contract with us expires today,'' G.C. Exh. 24) that Maurer gave Lopez later that day.

Dominguez immediately went to Becerril's office and asked her ''what's the meaning of this?'' Realizing that Maurer had given Dominguez the form letter in error, Becerril tore up the letter. Then, confirming that Dominguez was terminated, Becerril said ''I was supposed to work until the 7th of February.'' (Tr. 317, 319–320, 362.)

Being already discharged, effective February 7, Dominguez decided not to work the remaining week of his temporary contract. He told Becerril that he could not work until February 7, ''there was too much confusion, I was tense already.'' He complained that management acted in very bad faith toward the employees and the four of them. ''And when she asked me again if I could work until the 7th of February . . . it was just like obliging me to.'' He credibly testified that he felt obliged to resign (if he was not going to work the remaining week), so he said ''just give me the resignation papers, I'll . . . resign right now.'' (Tr. 320–321, 363–364.)

Dominguez filled out and signed the resignation form (G.C. Exh. 17). Becerril countersigned it and then (Tr. 366) gave him his termination letter (G.C. Exh. 16), dated January 28 (2 days earlier, as discussed above). I note that on the first day of trial (September 28, 1988), the General Counsel erroneously stipulated that the letter Chef Maurer gave Dominguez was the termination letter (G.C. Exh. 2, a xerox copy of G.C. Exh. 16), instead of the contract-expiration form letter (similar to the letter Maurer gave Lopez later that afternoon). By the time Dominguez testified at the resumed trial on June 25, 1990, he had found the original of the termination letter (that Becerril had given him, G.C. Exh. 16), which Dominguez had retained (Tr. 369–370).

I discredit Becerril's claim that on Saturday *morning*, January 30, Dominguez came to her office ''to resign.'' According to her, Dominguez said ''we had treated them badly'' and was ''really bad-mouthing the company.'' She said he did not have to leave until February 7 (confirming his termination) and handed him his termination letter (G.C. Exh. 16), but he said he wanted to resign. She gave him a resignation form, he filled it out and handed it to her, and left. (Tr. 1497–1498, 1544.) (I also discredit Palli's claim that Dominguez came in that morning at 9:30 to resign, Tr. 1352–1357.)

Thus, Becerril's (and Palli's) version is that this happened in the morning, omitting any reference to Chef Maurer's participation in the termination (when Dominguez reported to work that afternoon). The Company offers no explanation for its stipulation on the first day of trial that the termination letter (G.C. Exh. 2, a xerox copy) was given to Dominguez on January 30 *by Maurer* (Tr. 25). As found, when Maurer told Dominguez that afternoon that his services were being terminated, Maurer in fact gave him the contract-expiration form letter (similar to the one Maurer later gave Lopez, G.C. Exh. 24), which Becerril tore up when he asked her about it.

I reject the Company's contention in its brief (at 77–78) that Dominguez ''does not have a right to the remedies invoked'' because he ''resigned his position voluntarily.'' Having already been discharged (effective February 7), he did not resign his position. He merely signed the resignation form to decline working after being discharged.

11. Discriminatory motivation revealed

On Saturday afternoon, after terminating Dominguez, Becerril met informally in the hallway with Dominguez, Lopez, and Perez and made a statement linking their termination to their participation in the January 27 protest meeting.

Becerril admitted talking to the three employees that Saturday. She testified that ''I'm not saying that it is untrue that I sat with [Perez] on a sofa'' and further that this was near the oceanside garden area, when she was talking first with Perez and Lopez, and Dominguez ''joined us'' (Tr. 1501).

Dominguez credibly testified that after Becerril gave him the termination letter that Saturday afternoon, she ''left the

office and I left maybe five minutes later.'' He saw Becerril, Lopez, and Perez and joined them. The employees were complaining about ''how poor they had acted with us'' and Becerril ''explained that if we had stopped operations . . . for the [protest] meeting . . . *we could do it again*'' (emphasis added). The employees told her ''it was no stoppage'' of work, that management had called the meeting to discuss their status. (Tr. 324–326.)

Lopez similarly recalled that Becerril said that ''based upon what had been said at the Chef's office [in the protest meeting] . . . . the management . . . wanted to foresee that that situation *would not happen again*'' (Tr. 619, emphasis added). In his pretrial affidavit (R. Exh. 8A, p. 3), given March 1 (about a month later), Lopez recalled that in the conversation with Dominguez, Perez, and himself, Becerril stated that they ''had decided to do without our services in order to prevent *another situation like that one*'' (emphasis added.)

By the time Perez testified at the trial about the conversation (on June 26, 1990), he recalled that Becerril went further and told the employees they had been fired because they were ''speakers for the union and that we were subversive persons'' (Tr. 485). I discredit this version, noting that in a pretrial statement given about a month after the incident (R. Exh. 5A, p. 9), Perez recalled that what Becerril said was similar to what Dominguez and Lopez testified, that ''she had to foresee that what they did once *they could do again*'' (emphasis added).

Contrary to Becerril's denial (Tr. 1501), I find that she at least implied that the four employees were terminated because of their protected concerted activity in making the protests at the January 28 meeting on behalf of themselves and other kitchen employees. I therefore find that her statement (linking the employees' termination to their participation in the protest meeting) was coercive and violated Section 8(a)(1) of the Act.

I also find that Becerril's statement revealed a discriminatory motivation for the termination of the four employees: that a reason for their termination was their protected concerted activity.

In this connection, I note that at the trial the Company took a position that implies its concern about the four employees' challenge at the protest meeting. As quoted above, the Company argued (Tr. 845) that ''What this case is about basically'' is that 4 employees out of 600 or 700 hired at the hotel opening ''challenged the use of these temporary contracts.''

12. Company defenses

a. *No 2 p.m. meeting scheduled*

The Company acknowledged in its brief (at 45) that ''If a meeting had been scheduled [for 2 p.m., January 28], the employees would have a defense for not signing the contract on the 27th.'' The reason is obvious.

The earliest expiration date of the first temporary contracts was Friday, January 29 (the 90th day after the November 1, 1987 hotel opening). The kitchen employees were told Wednesday afternoon, January 27, that most of them were required to sign a second temporary contract. If the four employees (who were representing themselves and the other employees) were then told in the protest meeting that they could discuss this requirement with General Manager Tracy in a 2 p.m. meeting on January 28 (a day before the earliest expiration date), they indeed ''would have a defense for not signing'' the contract on January 27. As the General Counsel argues in his brief (at 56), they ''had no reason to believe that they would not be afforded an opportunity to sign a contract after the meeting scheduled the next day.''

But the Company asserts its own defense for its actions.

Despite the evidence (a) that Acting General Manager Luis Morales (who did not testify) arranged with Becerril in the Wednesday protest meeting to schedule the 2 p.m. meeting with Tracy, (b) that Sous Chef Andrews posted two large notices of the scheduled meeting to all kitchen employees, and (c) that employees admittedly began arriving around 1:30 Thursday afternoon for a meeting with General Manager Tracy, the Company contends in its brief (at 2): ''No meeting was canceled because no meeting had been announced or agreed to.''

I reject this defense as frivolous.

Instead of producing Sous Chef Andrews as a witness, the Company relies on the claim by Carlos Rivera (whose credibility is discussed later) that ''I don't remember'' Andrews' posting a notice (Tr. 1245).

Food and Beverage Manager Cruz claimed, ''I don't remember [Luis] Morales being there at all'' (Tr. 934). (Both Becerril and De Varona admitted that Morales was present at the protest meeting, Tr. 1009, 1462). Cruz also claimed that he did not remember ''that a meeting at 2 o'clock the next day was mentioned'' and (incredibly) that ''what I'm getting at is it's the first time [while he was testifying at the trial] I've heard it mentioned by anybody'' (Tr. 938).

After Cruz testified, Food and Beverage Assistant Manager De Varona (as discussed above) positively denied that when he saw the four employees at the hotel about 1:30 the next afternoon (to attend the 2 p.m. meeting, as found), they inquired ''about some meeting that was going to happen that day.'' But after reading from his pretrial affidavit, he admitted that they asked about ''the meeting with Mr. Tracy,'' although he did not admit telling them the 2 p.m. meeting had been canceled.

Becerril, testifying after this admission by De Varona, admitted that she did mention letting the employees talk to Tracy the next day. She claimed (Tr. 1477):

> Well, I do remember that at some time they . . . asked to see Mr. Tracy and I told them that they could go to my office the next day in order to see if they could see Mr. Tracy, he was out of the country at that moment, but as I understood he was coming back the next day, so I thought that it was a good moment . . . to let them give or air their feelings to Mr. Tracy concerning why they were refusing to sign the contracts.

Thus, according to this version of what was said about a meeting with Tracy, she told the employees they could come to her office the next day (when she was away, conferring with Company Attorney Vega, Tr. 435).

In view of the overwhelming evidence to the contrary and her demeanor on the stand, I discredit Becerril's claim that she merely told the employees that they could come to her office the next day ''to see if they could see Mr. Tracy,'' rather than scheduled the 2 p.m. meeting with him.

I find, however, that even if the Company's contention (that there was no 2 p.m. meeting scheduled) were not frivolous and Becerril instead invited the employees to her office for a meeting with Tracy, that invitation would have been an implicit authorization for the employees to delay signing the temporary contract in the meantime.

b. *Purported deadline for signing contract*

The Company took the unequivocal position at the trial that Wednesday, January 27, was the deadline for the kitchen employees to sign the second temporary contract (Tr. 635–636).

As the trial progressed, however, it became obvious that there was not such a deadline. The evidence shows that at least 11 kitchen employees signed the contract on various dates after January 27. Luis Rodriguez signed January 29 (G.C. Exh. 47). Rafael Caraballo, John Morales, and Italo Sibilia (three of the eight employees who attended the January 27 protest meeting) and also Cecilio Aponte, Milton Arrocho, Robert Clifford, Dionisio Rosado, and Victor Sanchez signed January 30 (G.C. Exhs. 46, 48–51; R. Exh. 22; Tr. 1387–1389). Carlos Rivera (who also attended the protest meeting) and Itza Soto (who went with Ithier to sign the contract on January 28, when Palli said they would be called later) signed February 1 (R. Exh. 24; Tr. 1385).

Human Resources Assistant Director Palli gave various explanations for these late signers. She claimed at one point that ''the truth exact is that almost all [our kitchen employees] signed on the 27th, but we didn't put the 27th on [the contracts]. We put the same date they were supposed to start the new contract.'' (Tr. 1384, 1392.) She later admitted, however, that some of the kitchen employees did sign the contract on January 28, 29, 30, and February 1 (Tr. 1394–1395). She also claimed that some of the employees signed after January 27 because they were too busy to sign and had told either her or Chef Maurer that they would sign later (Tr. 1327–1328, 1335–1336, 1382–1391). This is an unlikely explanation for the employees who signed 3 and 5 days later.

Food and Beverage Director Cruz, when questioned about what the employees were told in the January 27 protest meeting, revealed no knowledge of their being told of a deadline that day for signing the new contract (Tr. 885–887, 900). He testified that he had been instructed (by management) that when the employees' contracts *expired later that week* (''the latest would be the last day in January, depending on when they were hired three months out''), they were to have signed a contract ''or to have the situation resolved one way or the other'' before reporting to work the next day (Tr. 890–891). Yet the Company, relying on this same cited testimony by Cruz, contends in its brief (at 44) that at that meeting, ''the employees were clearly told that the contracts had to be signed that day.'' This contention appears to be at least a misunderstanding of Cruz' testimony.

I note that at the close of the trial (Tr. 1584) the Company shifted its position and, in effect, admitted there was no January 27 deadline for the four employees to sign the new temporary contract. It then took the position (in the words of its counsel) that ''had they said they would sign a temporary contract at any point in time, I am sure they would have received it.''

I find that the position taken by the Company earlier at the trial, that January 27 was the deadline for the kitchen employees to sign the contract, was erroneous.

c. *Not aware of union activity*

(1) Only one guard in kitchen

The Company contends in its brief (at 47) that about 10 p.m. on Wednesday, January 27, when Cruz ''made the decision to replace immediately'' the four employees and told Becerril, ''Let's hire some people in,'' neither he nor Becerril ''had any knowledge of the employees' sympathies.'' Its theory is that because the employees did not go to the Union until Thursday morning, Cruz and Becerril could not be aware of their union activity that Wednesday evening.

Yet earlier in the same brief (at 6) the Company, citing 10 references to the transcript, acknowledges that ''After the [protest] meeting, Perez suggested that they should *seek counsel from a union* in view of their belief that promises were being violated'' (emphasis added).

It was in defense of this evidence and the evidence that the Company for the first time posted guards in the kitchen that evening, that the Company made a major effort at the trial to dispel any inference that Cruz' decision flowed from his knowledge of this planned union activity.

A part of this company effort was to dispute the evidence (a) that Security Shift Supervisor Santos posted two guards in the kitchen during much of the evening and (b) that one of the guards was standing nearby and listening to the conversation when the four employees discussed going to the Union the next day.

Ithier had testified that one guard stood about 6 or 7 feet from his work station, observing him (Tr. 100), and that when he, Dominguez, Lopez, and Perez agreed to go to the Union to seek advice, as suggested by Perez, ''we were talking in a normal voice . . . not hiding'' (Tr. 104–105). Ithier recalled that this guard and the other guard in the kitchen had walkie-talkie radios, and he knew them as security employees in the hotel (Tr. 98). After about 2 hours, both guards ''moved around the entire kitchen'' (Tr. 106).

Dominguez had testified that one of the guards was ''in front of us'' and the other was ''maybe 10 feet ahead'' (Tr. 301). He recalled seeing the guards there ''I would say for [something] like an hour'' (Tr. 302). Perez had testified that one of the two guards was ''on the other side of the counter'' and ''really paying attention to what we were saying'' (Tr. 408–409). He recalled their remaining in the kitchen ''Almost to the end of our shift'' (Tr. 410).

The Company states in its brief (at 82) that the Company ''does not deny the presence of a [single] security guard in the kitchen'' (emphasis added)—even though its own witness, cook Carlos Rivera, testified there was ''More than one'' that evening, ''I saw two'' (Tr. 1229). (I discredit Rivera's claim that even though ''It is possible'' that the guards were listening to what the employees were talking about, the guards were ''Never'' close to where the employees were working, Tr. 1232–1233.)

At the trial the Company did not call Security Shift Supervisor Santos (who assigned the guards) or either of the two guards to testify and did not produce Santos' shift report (Tr. 1130, 1143–1144), which undoubtedly would have shown the

times involved and the details of what happened. Instead, it introduced the testimony of Palli and Security Director Rafael Rodriguez.

The Company's witness Carlos Rivera testified on cross-examination that the two guards were walking around the kitchen an estimated 3 or 4 hours (Tr. 1234). Yet both Palli and Rodriguez claimed that only one guard was assigned and that he was assigned there as a stationary guard in error, because Supervisor Santos misunderstood her instructions merely to add the kitchen to this roving guard's rounds. Rodriguez further claimed that the error was corrected in about 10 or 15 minutes. (Tr. 777–780, 1119–1135, 1332–1334; G.C. Exh. 35.) These claims are not persuasive.

Despite the Company's efforts to prove otherwise I find, as indicated above, (a) that two security guards were posted in the kitchen that evening for an hour or two, or longer (the same evening the Company decided to replace the four employees) and (b) that one of the guards, standing nearby and listening to the employees' conversation, overheard the four employees when they discussed going to the Union the next day.

There remains the question of whether one of the guards used his two-way radio to notify the security supervisor about what he had overheard, alerting the Company to the planned union activity.

(2) No surveillance intended

(a) *Purported preventive measure*

Security Director Rodriguez testified that about 7:30 Wednesday evening, January 27, he received instructions from Acting General Manager Luis Morales to have the kitchen area well guarded as a preventive measure because of a ''heated up environment'' there. Rodriguez then instructed Security Shift Supervisor Santos to have a guard ''to be alert'' to ''anything unusual that would happen'' in the kitchen area. (Tr. 1119, 1125–1126.)

The Company presented two witnesses evidently to prove that an incident causing a ''heated up environment'' occurred that evening in the kitchen after the protest meeting. The first was cook Carlos Rivera (who spoke against the Union at the Company's antiunion ''orientation'' meeting, Tr. 1238). While on direct examination he claimed that the incident in which Lopez ''insulted'' him, calling him a ''traitor, a country betrayer and a Judas,'' occurred that Wednesday evening after the protest meeting (Tr. 1191–1192).

On cross-examination, however, Rivera conceded details that belied his claim that the incident occurred that evening. He finally agreed that it occurred when Lopez talked to him about signing a union card the next day (Tr. 1215–1217). He next gave contrary testimony that would support the Company's position, again claiming that the incident occurred ''the day of the meeting.'' This time he conceded that the incident occurred the day Lopez went home early. After being shown the attendance sheet, he then agreed that the incident could have happened January 28, ''but I don't remember the date.'' He claimed that the two guards were there to protect the hotel property from ''any criminal intent.'' (Tr. 1220–1221, 1227, 1229–1230.) By his demeanor, he appeared more interested in supporting the Company's cause than giving accurate testimony.

I discredit Rivera's claim that the incident occurred Wednesday evening. I also discredit his claim that Lopez ''threatened that he would wait for me outside the Hotel'' (Tr. 1192). In addition to other claims previously discredited, I discredit his claims (Tr. 1188), (a) that he told Chef Maurer *before* the protest meeting that he was too busy and would sign the temporary contract later (as found, he signed it *5 days* later, February 1), (b) that he did not agree with the protest (even though the Company admits that he attended the protest meeting), and (c) that the employees went into Chef Maurer's office without permission, in support of the Company's unfounded contention in its brief (at 32) that the employees who attended the protest meeting ''had abandoned their post and refused to work in violation of the Rules of Discipline.''

The other witness the Company presented to prove that the Lopez–Carlos Rivera incident occurred on the evening of the protest meeting was garde manger William Rivera. He claimed on direct examination that the reason Lopez called Carlos Rivera a country betrayer that evening was that Lopez felt ''very annoyed at Carlos because he thought that he was not supporting the group'' (Tr. 1252–1253). On cross-examination, however, William Rivera conceded that the incident occurred the same day he signed his regular contract on January 28 and the same day (also January 28) that Lopez did not work his entire shift (Tr. 1264, 1269). Yet, on redirect examination, he again claimed the incident occurred ''The same day of the protest'' (Tr. 1270). I discredit these claims.

I note that earlier in the trial, Palli admitted that this incident occurred January 28, when ''Jesus Lopez was harassing one of the cooks, Carlos Rivera'' (Tr. 782–783). I also note that another company witness, cook Rafael Caraballo (who became a supervisor about February 13) claimed that the incident occurred about 10 or 15 minutes *before* the protest meeting. Caraballo claimed that Lopez wanted Carlos Rivera ''to go into the [Chef's] office and [Carlos] did not want to,'' that Lopez ''told the people at the work place to stop working,'' and that ''Carlos did not want to stop working.'' (Tr. 1069, 1073, 1090.) I find that these claims were clearly fabricated.

I note that Caraballo further claimed that some of the employees ''left their workplace and went to the Chef's office'' (implying that they were not invited to the meeting) and that ''I did not want to go in, so I remained outside'' (although the Company admits in its brief that Caraballo attended the meeting). I discredit these claims and also Caraballo's claim that Lopez said ''he was going to beat [Carlos Rivera] up.'' (Tr. 1066, 1071.)

The Company contends in its brief (at 49–50) that

> all the witnesses clearly testified that Lopez' attack on Rivera took place on the same day of the meeting at the Chef's office, which everybody placed on January 27. Lopez alone says it happened on the 28th. . . .
>
> . . . .
>
> Carlos Rivera, William Rivera and Caraballo established that *right after the meeting at the Chef's Office*, an incident provoked by Lopez took place at the kitchen due to the fact that the latter felt that Carlos had not supported them by leaving the office.

This contention also appears to be at least a misunderstanding of the testimony.

The Company also contends in its brief (at 82) that ''*The Security [Was] Sent by Sands to the Kitchen Fearing Labor Disruption as a Protective Measure to Secure Its Property and Personnel*'' and (at 83) ''as a preventive measure due to the heated situation that arose in the kitchen.'' Thus, the Company emphasizes the necessity of security in the kitchen that evening, but admits the presence there of only a single stationary guard, who Security Director Rodriguez claimed was there only 10 or 15 minutes.

Because the evidence clearly shows that the Lopez–Carlos Rivera incident occurred the *next day* when Lopez was soliciting for the Union—not on January 27 as the Company contends in its brief (at 51)—I reject the Company's claim that it assigned security to the kitchen on the evening of the January 27 protest meeting as a ''protective'' or ''preventive'' measure to secure property and personnel.

Based on the Company's own evidence that it completely ignores, however, I find merit to its contention that ''*The Security [Was] Sent by Sands to the Kitchen Fearing Labor Disruption*'' (a possible strike).

(b) ''*Smells like a strike*''

On Wednesday evening, January 27, when Lopez took his meal break after the protest meeting, Security Shift Supervisor Santos ''sat at my table.'' It is undisputed, as Lopez credibly testified when questioned on cross-examination about his pretrial statement (R. Exh. 8A, p. 6), he told Santos ''this does not smell right and this *smells like a strike* [emphasis added]'' (Tr. 666–667).

By the time he returned to work, Lopez found two guards stationed in the kitchen. Santos came by and he asked her, ''Since when do you station guards in the kitchen?'' She answered, ''You said things you should not have said.'' After this conversation the four employees ''decided to go to the Union.'' (R. Exh. 8A, p. 6.)

Although this evidence is not mentioned in the Company's brief, I infer that this talk of a possible strike was the reason Acting General Manager Morales (''Fearing Labor Disruption'') immediately contacted Security Director Rodriguez who, about 7:30 that evening, instructed that Supervisor Santos have the security ''to be alert'' to ''anything unusual that would happen'' in the kitchen area (Tr. 1126).

Because of the timing of the sudden decision to replace the four employees that evening (about 10 o'clock) and the circumstances, I also infer that the Company was alerted to the employees' discussion, in front of one of the assigned security guards, about going to a union the next day.

Part of the circumstances is what Palli inadvertently revealed.

When testifying about Supervisor Santos' purported mistake in assigning a stationary guard in the kitchen, Palli claimed that she went to the kitchen about 7 or 7:15 that evening, ''saw the security officer standing'' there, and called Becerril, who said she would call Security Director Rodriguez to have the guard resume his rounds as a roving guard. If this time were accurate, this would have happened 15 or 30 minutes *before* 7:30 when Rodriguez testified that he instructed Santos to send security to the kitchen.

But three separate times Palli indicated that this time may not be accurate. After first claiming that this was ''Around 7:00 or 7:15 p.m.'' (Tr. 1328), she later testified that it was ''*around 10:00* . . . I mean, around 7:00 or 7:15'' (Tr. 1330, emphasis added). A second time, when asked what time this was, Palli answered: ''I went to the kitchen *around 10:00 to 10:15*,'' before again claiming it was ''7:00 or 7:15'' (Tr. 1334, emphasis added). The third time, after she claimed again it was ''Around 7:00 o'clock,'' the following transpired (Tr. 1337):

> JUDGE LADWIG: . . . . What time was this?
>
> WITNESS: This was in the kitchen *around 10:00 or 10:15*
>
> JUDGE LADWIG: 7:00 or 7:15?
>
> WITNESS: I mean, 7:00, 7:15.
>
> MR. HOPKINS: Your Honor, I would like the witness' answer of 10:00 or 10:15 to stand on the record. . . . I have reason to believe that really was the correct time. [Emphasis added.]

I agree with Attorney Hopkins for the General Counsel for a number of reasons. First, I find that Palli was not trying to testify candidly when she claimed she saw only one guard in the kitchen. If she had gone to the kitchen around 7 or 7:15 p.m., there would have been either no stationary guards there at that time (before 7:30 p.m.) or two guards.

As the Company's representative at the counsel table and a key witness, she had an obvious motive for trying to establish, untruthfully I find, that the purported mistake in assigning a stationary guard there was corrected early in the evening, before the guard would have an opportunity to overhear the talk about going to the Union. She would also have a motive *not* to reveal that she saw a guard (actually two guards) there at 10 or 10:15. Such an admission that a guard had remained in the kitchen over 2 hours would not only make it more likely that he overheard the talk about going to the Union, but would reveal a possible link between what was overheard and the sudden decision about 10 o'clock that evening to replace the four employees. Yet, even though she obviously had planned to testify 7 or 7:15, three times she testified what I infer was the true time, 10 or 10:15 p.m.

Another part of the circumstances is Security Director Rodriguez' actions. In the ''Security Incident Summary'' he prepared the next day, Rodriguez falsely referred to only one security guard and omitted how long the guard remained in the kitchen. The summary read (G.C. Exh. 35, p. 2):

> At 7:30 P.M., Mr. Luis Morales instructed Mr. Rafael Rodriguez, Director of Security, to assign a S/O [security officer] to conduct rounds at the Kitchen area. Due to problems we were expecting on that area. Apparently the instructions were misunderstood by the S/O assigned to this job, instead he stood still at the Kitchen area. He was instructed again in relation with his job. He was supposed to conduct rounds at intervals thru the Kitchen area.

Then at the trial he claimed that this purported misunderstanding was corrected after 10 or 15 minutes, contrary to other witnesses who credibly testified there were two guards in the kitchen much of the evening.

I infer that the Company, by failing to present at the trial either Security Shift Supervisor Santos or one of the two guards who had direct knowledge of what happened in the

kitchen, by failing to produce Santos' shift report of the incident, and by introducing this discredited testimony, was seeking to conceal the fact that the Company was alerted that evening to the four employees' plans to go to the Union.

I therefore find that when the Company decided about 10 p.m. on January 27 to replace the four employees, it was aware of their planned union activity.

d. *Four employees never fired*

The Company contends in its brief (at 2) that ''The employees were never fired. They refused to sign another definite term or temporary contract; thus, their work contract expired. They unilaterally tried to force management into giving them a regular job, which management had not offered.''

Having found that the Company refused to permit the four employees to sign the temporary contract after the Union advised them to do so, I reject this contention.

e. *Immediate replacements required*

The Company contends in its brief (at 3, 47):

> It was the peak season and the kitchen is crucial, so that replacements were needed and sought immediately. . . .
>
> . . . .
>
> Upon learning from [Becerril] that the employees had not signed [by the 9 p.m. deadline, January 27], Cruz knew that Sands needed to get four replacements. Because the employees had vehemently refused to sign their contracts [in the protest meeting] at the Chef's office, both Cruz and [Becerril] honestly felt that the employees would not sign the contracts offered. Cruz made the decision to replace immediately that same night about 10:00 p.m. He told [Becerril] at dinner: ''Let's hire some people in.'' . . .
>
> The Company took into account that two of the employees who refused to sign [presumably Dominguez and Perez] were highly skilled and that replacing them was going to take more time because candidates with special qualifications would have to be found. Finding replacements immediately was essential because it was the busy season, Sands was operating at full capacity; and among its guests, there were visitors from the parent company.

To the contrary, the evidence clearly shows there was no 9 p.m. deadline, and Acting General Manager Morales had arranged with Becerril at the protest meeting earlier that evening for the employees to meet with General Manager Tracy in a scheduled meeting at 2 p.m. the next day to discuss the requirement of a second temporary contract. Such a meeting would not have been scheduled if ''the employees had vehemently refused to sign their contracts at the Chef's office'' and if the Company was planning to discharge the four employees unless they signed a temporary contract by 9 o'clock that evening.

I therefore reject the Company's contention that it believed that evening that replacements were required.

f. *Other defenses*

I reject the Company's contention in its brief (at 93) that ''All of General Counsel's witnesses merit ZERO credibility.''

I also reject the Company's many other clearly unfounded contentions in its lengthy (120-page, legal-size) brief.

13. Concluding findings

Before the mention of a possible strike, management representatives met with the leading protesters Dominguez, Ithier, Lopez, and Perez about 1-1/2 hours in the late afternoon and early evening, January 27, in an effort to justify the requirement of a second temporary contract. To resolve the protests, Acting General Manager Morales arranged for a meeting to be scheduled at 2 o'clock the following afternoon with General Manager Tracy.

Immediately after Lopez, at his meal break following the protest meeting, told Security Shift Supervisor Santos that ''this does not smell right and this smells like a strike,'' Morales contacted Security Director Rodriguez. About 7:30 p.m. the Company posted two security guards in the kitchen ''to be alert'' to ''anything unusual that would happen'' there. While posted there, one of the guards overheard the four employees discuss going to the Union the next day.

About 10 o'clock that evening, after the Company became aware of the four employees' planned union activity (as found), the Company decided to replace all four of them and canceled the scheduled meeting with Tracy.

The following afternoon, after the Union advised the four employees to sign the temporary contract, they and other kitchen employees went to the hotel early to attend the 2 p.m. meeting. The Company informed the employees that the meeting had been canceled and refused the four employees' offers to sign the temporary contract. Instead, the Company gave each of them a termination form letter, expressing regrets for their ''decision'' not to sign the temporary contract.

The Company revealed a discriminatory motivation when a supervisor, Sous Chef Richardo Morales, linked Perez' discharge to his identifying himself with the Union and when Human Resources Director Becerril justified the discharge to Dominguez, Lopez, and Perez by saying they had stopped the operations for the protest meeting and they ''could do it again.'' The protests were clearly protected concerted activity.

I find that the General Counsel has made a strong prima facie showing sufficient to support the inference that the four employees' leading role in the January 27 protest meeting and their plans to go to the Union the next day were motivating factors in the Company's decision to replace and discharge them and to refuse to permit them to sign renewal contracts. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

Having rejected the Company's many defenses, I find that the Company has failed to carry its burden to demonstrate that it would have terminated the four employees in the absence of their union and protected concerted activity.

I therefore find that the Company unlawfully discharged Jose Dominguez, Ismael Ithier, Jesus Lopez, and Francisco Perez for engaging in union and protected concerted activity, violating Section 8(a)(1) and (3) of the Act.

C. *Unlawful Surveillance*

As found above, on the evening after the January 27 protest meeting, immediately following cook Jesus Lopez' statement to Security Shift Supervisor Santos that ''this does not smell right and this smells like a strike,'' the Company (at Acting General Manager Morales' direction) posted two security guards in the kitchen for much of the evening ''to be alert'' to ''anything unusual that would happen.''

The Company contends in its brief (at 82) that fearing labor disruption (presumably strike action in protest to the continued temporary employment), it sent the security to the kitchen as a protective measure to secure its property and personnel. Yet it admits only one guard being posted, for only 10 or 15 minutes—contrary to the testimony of its witness Carlos Rivera that two guards were there for 3 or 4 hours (Tr. 1229, 1234).

There is no evidence of any unlawful or unprotected conduct in the kitchen that evening, requiring the posting of two stationary guards to protect property or personnel. I find that the Company posted the two guards to observe and overhear the conversations of the four employees and any other kitchen employees who might be discussing strike action or other lawful response to the Company's requirement of continued temporary employment.

I therefore find, as alleged in the complaint, that on January 27 the Company engaged in unlawful surveillance of its employees' protected concerted activities in violation of Section 8(a)(1) of the Act.

I also find that the Company engaged in unlawful surveillance of employees on payday, Friday, January 29, as the employees were on their way to and from the bank in a shopping plaza diagonally across the street from the hotel. At the corner in front of the plaza, about 100 feet from and within full view of anyone standing on the sidewalk at the hotel's employee entrance, were employees Dominguez, Lopez, and Perez, along with two union representatives, solicited signatures on union cards. (Tr. 305–311, 425–428, 604–606, 1443, 1569–1574.)

There is credible evidence that there was one or two security guards on the sidewalk near the employee entrance (where a guard is not ordinarily posted) and a security guard with binoculars at the window of an upstairs room in the hotel, watching the solicitation. Some of the employees would not approach the union solicitors, or would not sign a card there, because they were being watched from the hotel. (Tr. 312–314, 357–361, 431–432; R. Exh. 8A, p. 7.)

Besides denying that the guards were engaging in this conduct, the Company argues in its brief (at 109) that ''management may observe union activity that is public, especially if conducted on company premises, without violating the Act unless the officials involved do something out of the ordinary. This union activity was not conducted on or near the company premises.

I find that the obvious purpose of the Company's assigning the security guards to engage in this surveillance, where the guards would be observed by employees approaching the union solicitors, was to coerce the employees, interfering with their talking with the solicitors. I therefore find that the Company further violated Section 8(a)(1) of the Act.

D. *Overly Broad No-Solicitation Rule*

I reject the General Counsel's contention that Human Resources Assistant Director Palli (on January 29) promulgated and enforced an overly broad no-solicitation rule by prohibiting union campaigning in the employee cafeteria.

Employee Perez credibly testified that Palli entered the cafeteria and told employee Lopez to leave because she had been told that his breaktime had expired. Lopez stated that was not true, he was still on his breaktime, but Perez told him, to avoid any problems, to go back to his workplace. Perez admitted continuing to talk for the Union after Lopez left. (Tr. 420–421.)

Although Lopez recalled that Palli told him ''You cannot talk about the union here'' before saying ''you have exceeded your break time by ten minutes'' (Tr. 687), I find that Palli was not promulgating an overly broad rule, whether or not she was mistaken in believing he had exceeded his break period.

CONCLUSIONS OF LAW

1. By discriminatorily discharging Ismael Ithier and Jesus Lopez on January 28, Francisco Perez on January 29, and Jose Dominguez on January 30 because of their union and other protected concerted activities, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

2. By engaging in surveillance of its employees' union and other protected concerted activities, the Company violated Section 8(a)(1).

3. The Company did not promulgate and enforce an overly broad no-solicitation rule.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged four employees (who were already permanent employees under Puerto Rican law, or who would have become permanent employees after 90 days if not discharged, Tr. 1476, with any doubt resolved against the wrongdoer, not the employee victims), it must offer them reinstatement as permanent employees and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Any dispute over whether the four employees were permanent employees when discharged (entitling them to wages and benefits as permanent employees from date of discharge) or would not have become permanent until the expiration of the second temporary contract, can be resolved in the compliance stage of this proceeding.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, S.J.P.R., Inc. d/b/a Sands Hotel and Casino, San Juan, Puerto Rico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting Union De Trabajadores de la Industria Gastronomica de Puerto Rico, Local 610, Hotel Employees and Restaurant Employees International Union, AFL–CIO or any other union.

(b) Discharging or otherwise discriminating against any employee for engaging in protected concerted activity.

(c) Engaging in surveillance of its employees' union and other protected concerted activities.

(d) Informing employees they were discharged for protected concerted activities.

(e) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Jose Dominguez, Ismael Ithier, Jesus Lopez, and Francisco Perez immediate and full reinstatement as permanent employees to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful termination and notify the employees in writing that this has been done and that the terminations will not be used against them in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Isla Verde, Carolina, Puerto Rico, copies of the attached notice marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 24, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''